No. 86-1541

In The

Supreme Court of the United States

October Term, 1986

TOWNSHIP OF BRICK, A Municipal Corporation of the County of Ocean and State of New Jersey,

Petitioner,

vs.

BLOCK 48-7, LOTS 34, 35, 36, KENLAV, c/o Party Time Inn, and Other Lands,

-and-

ROBERT V. PASCHON and BYRON KOTZAS,

Respondents.

On Petition for Writ of Certiorari to Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether failure of a tax-foreclosing municipality to serve notice of the proceedings on taxpayer-owners at known or readily available addresses after actual knowledge by its foreclosing agent that such addresses were readily available and that previously mailed notices to them had been returned by the postal authorities as undeliverable as addressed because the taxpayer-owners had moved and a forwarding order had expired constitutes a denial of due process.

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OPINIONS BELOW

Neither the trial court's opinion (Pet.App.23a *et seq.*) on the first remand by the Superior Court, Appellate Division

("Appellate Division") nor the oral findings of the trial court on the second remand (Pet.App.9a *et seq.*) is reported. The opinion of the Appellate Division after the first remand (Pet.App.14a *et seq.*) is reported at 202 N.J. Super. 246, 494 A.2d 829. The opinion of the Appellate Division after the second remand (Pet.App.3a *et seq.*) is reported at 210 N.J. Super. 481, 510 A.2d 101. The order of the Supreme Court of New Jersey denying certification (Pet.App.1a) has not yet been reported.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The texts set forth in the petition (p. 2 *et seq.*) are accurate except in the following respects: at p. 5, 7th line, insert "bar" after "forever;" at p. 5, 22nd line, insert "of redemption" after "failure;" at p. 6, 5th line, strike "on" and insert in its place "or."

COUNTER-STATEMENT OF THE CASE

In September 1982 respondents were the joint owners of three lots of vacant land in the petitioner municipality which were in arrears of taxes of about $54,000. The appraised value of the lots at that time was approximately $810,000 (Resp.App.2a). On September 8, 1982 petitioner instituted an in rem complaint of tax foreclosure of some 80 parcels of land including respondents' lots. Final judgment of foreclosure was entered February 9, 1983. Early in January 1984 respondents, having inquired of the tax collector as to the amount of arrearages on the lots in order to pay them, were informed by him, and thereby learned for the first time, that the properties had been foreclosed. Respondents promptly filed order to show cause proceedings in the Chancery Division of the Superior Court for relief from the foreclosure on the due process ground that they had not been given notice of the foreclosure proceedings. The Chancery Division denied relief (Pet.App.50a).

Respondents appealed to the Appellate Division which, after a preliminary remand for enlargement of the record, reversed the Chancery Division and remanded again for a factual hearing into the circumstances as to petitioner's knowledge of facts relevant to respondents not having been served with the foreclosure proceedings [Pet.App.14a; 202 N.J. Super. 246, 494 A.2d 829 (1985)]. After hearing in the Chancery Division on the second remand, another denial of relief by that court (Pet.App.8a), and appeal again to the Appellate Division, that tribunal reversed and held respondents entitled on due process grounds to relief from the foreclosure judgment, on terms of prompt payment of the tax arrears (Pet.App.3a; 210 N.J. Super. 481, 510 A.2d 101). The New Jersey Supreme Court denied petitioner's application for certification to review the Appellate Division judgment (Pet.App.1a).

The circumstances attending the tax foreclosure were the following. Respondents were listed as owners of the property in question on the tax rolls at the former law office address of respondent Paschon, at 1277 Hooper Avenue, Toms River, New Jersey. Some time prior to the institution of the foreclosure proceedings Paschon's law office had been moved to 1005 Hooper Avenue in that town. Notice of the foreclosure proceedings was attempted to be served upon respondents by mailing to the tax record address of the property owners at 1277 Hooper Avenue. Since Mr. Paschon's law office had been moved to 1005 Hooper Avenue a considerable time previously, and respondents consequently could not be found at 1277 Hooper Avenue, the mailed notices were returned by the post office to the foreclosing agent of the plaintiff with the envelopes prominently stamped, "Return to Sender", "Unable to Forward" "Undeliverable as Addressed" and "Forwarding Order Expired" (Pet.App.15a). Consequently respondents were never aware of the foreclosure of their interests in the lots until eleven months later when they discovered the facts upon inquiry as to how much taxes they owed.

The foreclosing attorney for petitioner, one Joseph L. Foster, delegated the actual conduct of the foreclosure proceedings almost entirely to one Lucille Foley, who had been doing tax foreclosure proceedings for various attorneys on a part-time basis for a period of about 15 years (Resp.App.5a-6a). In the present instance, as part of her employment by the foreclosing attorney, she prepared the pleadings, including the complaint, the affidavit of service and the affidavit of non-military service (Resp.App.7a-8a); she personally typed all of these documents including the names of respondents Paschon and Kotzas in the caption as owners of the property; she mailed out the notices to all the defendants in the proceedings and she reviewed the tax foreclosure list and physically attached it to the complaint at the time she typed it (Resp.App.9a).

In connection with her preparation of the affidavit of service, Ms. Foley examined all of the certified mail envelopes and receipts in order to make a determination as to which foreclosure notices had been received by various defendants and which had been returned by the postal authorities undelivered (Resp.App.10a). The affidavit of service specifically indicated that the mailings to Messrs. Paschon and Kotzas, both at 1277 Hooper Avenue, Toms River, were "Returned" (Resp.App.10a). Ms. Foley made that determination by personally examining the returned envelopes of the certified mailings to these respondents and observing thereon the notations concerning non-delivery mentioned above (Resp.App.10a, 11a).

Ms. Foley testified that when she was doing the tax foreclosure, she knew of respondent Robert Paschon as a practicing lawyer in the area and that he maintained an office for the practice of law in the area at which he regularly received mail (Resp.App.6a, 7a, 12a). Ms. Foley also testified that she was aware of respondent Kotzas as a principal of the Crossroads real estate firm and that Crossroads maintained an office for the doing of real estate business in the area at the time of the

foreclosure proceedings at which Kotzas regularly received mail (Resp.App.7a).

Ms. Foley was questioned at the hearing in the Chancery Division as follows:

> "Q. When you saw the returned envelope from Paschon and you typed the affidavit of mailing which said, 'Returned' you physically took the envelope and attached it to the affidavit, didn't you realize that the envelope had been misaddressed or else it would have been received? A. I treated this envelope the same as I treated all the others that were returned. " (Resp.App.12a).

There was evidence before the Chancery Division that information was available in the New Jersey Lawyers Diary and Manual or the local telephone book to ascertain where respondents could readily have been found, assuming Ms. Foley did not already know those addresses (Pet.App.18a).

Although Mr. Foster, the foreclosing attorney, had nothing more to do with the foreclosure than examining pleadings as to legal form and signing the complaint, the affidavit of service and the affidavit of non-military service (neither of which he had prepared), and consequently did not know that respondents were defendants in the proceeding, he did know both Mr. Paschon and Mr. Kotzas. He was also an attorney with offices in Toms River and had personally for years had previous dealings with respondent Paschon's law firm, including the more recent period when it was at 1005 Hooper Avenue. Additionally, Mr. Foster and respondent Kotzas had been jointly involved on behalf of a common client in matters before a Planning Board. Kotzas was frequently in Mr. Foster's law office in connection with business he had with Foster's law partner.

In its first opinion in this matter, the Appellate Division, in directing a remand for hearing of the facts, specified the criteria for relief to respondents, as follows:

> "Relief from the judgment should be granted only if anyone actively involved for plaintiff in the preparation and prosecution of the foreclosure suit had actually recognized before the default judgment from any information, including the return of the mailed notice, that the addresss carried on the tax duplicate for Paschon and Kotzas was inaccurate or stale and that, therefore, notice mailed to that address would probably not be delivered, and that another, known or readily available address could be used to notify them of the foreclosure suit." (Pet.App.22a), 202 N.J. Super. at 254, 494 A.2d at 833.

In its second and final opinion disposing of the matter, the Appellate Division, after summarizing the evidence alluded to herein, expressed its reasoning for its conclusion of denial of due process to respondents as follows:

> "Counsel and Mrs. Foley were both consciously aware of defendants' presence in the area and their ready availability for service. Counsel did not consciously link that information with the non-delivery of mailed process because he insulated himself from knowledge of facts involved in the suit, otherwise counsel would have become aware of the obvious facts before him. Mrs. Foley, who actually handled the suit, had before her the returned service marked 'forwarding order expired.' Although she did not recall her reaction, the information was plainly and simultaneously

before her both that defendants' address was outdated and that defendants had readily available addresses where they could be reached. Because Mrs. Foley actually recognized the existence of all of that information, it is no matter that she does not recall if she recognized it all at the same instant. In those circumstances, the proofs satisfied the standard established in our earlier opinion." (Pet.App.7a), 210 N.J. Super. at 484-85, 510 A.2d at 103.

ARGUMENT

Petitioners show none of the circumstances specified by Rule 17 of this Court as indicating the character of reasons that will be considered on petition for certiorari. Indeed, the determination below was essentially a factual one, not appropriate for review by this Court. Moreover, petitioner has certainly not shown that the New Jersey court has decided the due process question "in a way in conflict with the decision of another state court of last resort or of a Federal Court of Appeals" [Rule 17(b)]. Consequently, the real question presented is whether the Appellate Division decision has decided a due process question "which has not been, but should be settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court" [*Id.* (c)]. The decision by the Appellate Division of the due process question is entirely in accord with applicable decisions of this Court and the question therefore needs no further settlement by the Court.

The basic criteria for notice satisfying the requirements of due process to parties who may be affected by legal proceedings are by now thoroughly established by a series of cases beginning with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 2d 865 (1950), through *Mennonite*

Board of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983). The most significant of these criteria may be stated as follows:

> (a) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 314.

> (b) "But when notice is a person's due, process which is a mere gesture is not due process. *The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.*" (emphasis added) (*id.*, 339 U.S. at 315).

The latter test was reiterated by the Court in *Covey v. Somers,* 351 U.S. 141, 146, 76 S. Ct. 724, 100 L. Ed. 2d (1956), and in *Mennonite Board of Missions v. Adams, supra,* (462 U.S. at 799).

A corollary of both of the mentioned basic criteria of due process notice is that if the sender of the notice has knowledge of special circumstances pertaining to the addressee such that it is unlikely that, even if the notice is sent by the mails to the last available address, it will come to the actual attention of the addressee, the notice will be deficient. Thus, in *Robinson v. Hanrahan,* 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972), a proceeding to forfeit an automobile was held lacking in due process since the authorities, in sending notice of the proceedings

to the defendant's home, ignored their own knowledge of the fact that he was at the time in jail and that therefore the notice would not come to his attention.

Similarly, in *Covey v. Somers, supra*, the Court found absence of due process when an incompetent landowner received only mail notification of an impending foreclosure on tax delinquent premises, the Court observing that the plaintiff was aware that such a notice was not adequate to permit a known incompetent to present a defense, 351 U.S. at 146.

A case which is practically on all fours with the instant one is *Tracy v. County of Chester, Tax Claim Bureau,* 489 A.2d 1334 (Sup. Ct. Pa. 1985). There a notice of an impending tax sale was sent to the taxpayer at a previous address, but it was returned by the postal authorities to the Tax Bureau undelivered because a one-year forwarding order was no longer effective. The Pennsylvania Supreme Court held the resulting tax sale to be invalid. After citing the *Mullane* and *Mennonite* cases, *supra,* the court stated:

> "Applying these principles to the present case, we hold that where a taxing authority intends to conduct a sale of real property because of nonpayment of taxes, it must notify the record owner of the property by personal service or certified mail, *and where the mailed notice has not been delivered because of an inaccurate address*, the authority must make a *reasonable effort* to ascertain the identity and whereabouts of the owner. ***" (emphasis in original) 489 A.2d at 1338-39.

Indeed, the result reached by the New Jersey Appellate Division in the case at bar is *a fortiori* from the result reached

in *Tracy* because *Tracy* required a reasonable inquiry, irrespective of the prior knowledge of the tax foreclosing authority, where a notice was not delivered because of an inaccurate address, whereas here *actual knowledge* of a readily available address was held requisite to any further action by the authority.

Other reported cases wherein notices of tax enforcement proceedings mailed to the owner were returned by the postal authorities as "undelivered" because the addressees were no longer at that address, and where, accordingly, the courts imposed upon the municipal authorities an obligation of reasonable inquiry of the location of the property owner, are *Federal Deposit Ins. Corp. v. Morrison,* 568 F. Supp. 1240 (N.D. Ala. 1983) and *Tobia v. Town of Roseland,* 106 A.D. 2d 827 (N.Y. App. Div. 1984). *See also, Smith v. Dept. of Health & Human Resources,* 432 So. 2d 997, 999 (La. Ct. App. 1983), where a return of mailed notice as undeliverable was ruled to impose a duty of reasonable inquiry on the sender, in another context.

See also, in reference to the principle that the knowledge of the giver of the notice as to the circumstances of the intended receiver bearing upon the likelihood *vel non* of the notice coming to the actual attention of the receiver is critical to whether due process will have been satisfied in a given situation: *United States v. Braunig,* 553 F.2d 777, 780 (2d Cir.), *cert. denied,* 431 U.S. 959 (1977); *Walker v. Hutchinson,* 352 U.S. 112, 117, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956); *In re Foreclosure of Liens for Delinquent Taxes,* 62 Ohio St. 2d 633, 405 N.E. 2d 1030, 1033 (Sup. Ct. 1980); *Fed. Nat. Mortg. Ass'n v. Beard,* 8 Kan. App. 2d 371, 659 P.2d 232, 236 (Ct. App. 1983); *Klinger v. Kepano,* 635 P.2d 935, 945 (Hawaii 1951); *Phillips v. Guin & Hunt, Inc.,* 344 So. 2d 568 (Fla. Sup. Ct. 1977); *Pierce v. Board of County Comm'rs of Leavenworth Co.,* 200 Kan. 74, 434 P.2d 858, 866 (S. Ct. 1967).

It is accordingly submitted that the determination by the New Jersey appellate courts that petitioner had not afforded respondents due process, on the given facts and circumstances, is well within the parameters of due process requirements laid down by this Court and generally recognized, and is not in conflict with any decision of this Court.

It might well be argued that the original notice sent to respondents at the stale law office address at 1277 Hooper Avenue was inadequate because of the clear knowledge of the foreclosing attorney, Mr. Foster, amply established by the proofs, that by September 1982, when the services were made, respondent Paschon had moved to 1077 Hooper Avenue so that the mailing to the prior address should have been known to Foster to be vain and futile. But whatever view may be taken in that regard in view of Mr. Foster's inattention to the proceedings, there cannot reasonably be any quarrel with the proposition that when the notices were returned by the postal authorities and the agent of the municipality in charge of the foreclosure was apprised thereby that the notices had been misaddressed, and she had actual knowledge that there were in fact readily available addresses where respondents regularly received mail, but nevertheless failed to send them notice at such addresses, petitioner defaulted in satisfaction of due process notice to these respondents, to their great injury. It makes no difference whether that default was motivated by any desire on the part of the agent to reap a windfall for the petitioner or whether it was simply out of the blind past practice of doing nothing more once original notices had been sent to the record address of the taxpayer. In either case petitioner, through its agent, ignored the constitutional requirement of using a means of notice "such as one desirous of actually informing the [party affected] might reasonably adopt to accomplish it." *Mullane, Covey* and *Mennonite,* all *supra*. If either Mr. Foster, the attorney, or Ms. Foley, his agent, were "desirous of actually informing" these respondents of the pendency of the foreclosure proceedings,

there cannot be the slightest doubt that, after receiving the undelivered notice envelopes from the postal authorities, they would have easily effected notice to respondents either at respondent Paschon's known new law office address, at respondent Kotzas' known business address, or at the homes of either of these respondents.

This is not a case of requiring a municipality to resort to extraordinary efforts to discover the identity and whereabouts of respondents; *cf., Mennonite Board of Missions v. Adams, supra,* 462 U.S. at 798, footnote 4. The identity and whereabouts of the respondents in the instant case were either actually known to petitioner's foreclosing agent or ascertainable with minimal effort. The Appellate Division's finding of fact to that effect is unimpeachable.

The Appellate Division's first opinion in this case demonstrates that it was cautious of respondents' claims in this matter and solicitous of a municipality's legitimate convenience in measuring a claim of denial of due process against it when conducting a tax foreclosure (Pet.App.18a-21a). Nevertheless, on the evidence developed at the hearing on the second remand, the Appellate Division had no doubt that the collective knowledge of the township attorney and the foreclosing agent was such as to require that after the return of the undelivered notices the petitioner was under a due process obligation to reserve respondents at known or readily available addresses. This determination was correct as a matter of fact, law and logic, and it was left undisturbed by the New Jersey Supreme Court when petitioner sought certification there. Petitioner's present argument, in effect, that the New Jersey courts have afforded respondents excessive due process is entirely insupportable.

Petitioner appeals to this Court to consider the neglect by the respondents to pay their taxes or to notify the municipality

of their change of address. The imputation is that respondents were unworthy of the protection of their interests by the New Jersey courts because they had contributed to their situation in the foregoing respects (Pet.17). Similar arguments were held unavailing in *Mennonite, supra,* where the court said:

> "Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. *** *More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.* *** Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* [emphasis by the court] party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. ***" (emphasis added, except where otherwise stated). *Mennonite Board of Missions v. Adams, supra,* 462 U.S. at 799, 800.

Petitioner also argues that the decision of the New Jersey courts somehow deprives it, petitioner, of due process and deprives all other foreclosed property owners, less prominent in the community than respondents, of due process and equal protection of the laws (Pet. at 14, 18, 20, 21, 22). These contentions are frivolous on their face. Moreover, states and political subdivisions of states are not "persons" contemplated for protection under the due process and equal protection clauses of the Fourteenth Amendment. *See Trenton v. New Jersey,* 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923); *Newark v. New Jersey,* 262 U.S. 192, 43 S. Ct. 539, 67 L. Ed. 943 (1923); *Com. of Pa. v. Porter,*

659 F.2d 306, 314 (3 Cir. 1981), *cert denied, Porter v. Pennsylvania,* 458 U.S. 1121, 102 S. Ct. 3509, 73 L. Ed. 2d 1383 (1982); *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). Finally, petitioner has no standing to complain of alleged constitutional deprivations of other foreclosed taxpayers who do not themselves complain. *Ibid.*

Petitioner's entire argument is founded on considerations *ab inconvenienti* rather than the requirements of due process as clearly set forth in precedential decisions of this Court. That argument is both unfounded in fact and entirely inappropriate as considerations for the issuance of certiorari by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — SUPPLEMENTAL CERTIFICATION OF BYRON KOTZAS

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION : OCEAN COUNTY

DOCKET NO. F-146-82

Civil Action

TOWNSHIP OF BRICK, a Municipal Corporation of the County of Ocean, and State of New Jersey,

Plaintiffs;

-vs-

BLOCK 685, LOTS 5, 6 and 7, assessed to CEDARBRIDGE ASSOCIATES,

Defendants.

SUPPLEMENTAL CERTIFICATION

I, BYRON KOTZAS, of full age, upon my oath do certify and say:

1. I am a petitioner in the above-captioned matter and would

like to supplement my previous certification in order to appraise the Court of the disparity in value between the foreclosed property and the amount required to redeem.

2. I have been advised by Richard E. Hall of Richard E. Hall Associates, Inc., that the property which forms the basis of this action, Block 685, Lots 5, 6 and 7, are valued at $810,000.00.

3. On information and belief, the amount required to redeem said property at the time of the foreclosure was approximately $54,000.00.

4. Consequently, had I or my partner, Robert V. Paschon, Esq., known of the pendency of the foreclosure we would most certainly have filed an answer and redeemed the property.

5. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: 2/8/84

By: s/ Byron Kotzas
BYRON KOTZAS

APPENDIX B — TRANSCRIPT OF REMAND HEARING

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION : OCEAN COUNTY

Docket No. F-146-82

TOWNSHIP OF BRICK, a municipal corporation of the County of Ocean and State of New Jersey,

Plaintiff,

vs.

BLOCK 48-7, LOTS 34, 35, 36 KENLAV, c/o Party Time Inn, and other lands, and ROBERT V. PASCHON AND BYRON KOTZAS,

Defendants.

Place:

Ocean County Courthouse
Toms River, N.J.

Date:

August 6, 1985

BEFORE:

THE HONORABLE HENRY H. WILEY, J.S.C.

TRANSCRIPT ORDERED BY: FREDERIC K. BECKER, ESQ.
(Wilentz, Goldman & Spitzer)

Appendix B

APPEARANCES:

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By CHARLES E. STARKEY, Esq.
Attorneys for Plaintiff.

MESSRS. WILENTZ, GOLDMAN & SPITZER
By FREDERIC K. BECKER, Esq.,
Attorneys for Defendants Paschon and Kotzas.

Reported by:
DAVID G. VORSTEG, C.S.R.

[Commencing at 51]

L U C I L L E C. F O L E Y, having been duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BECKER:

Q. Mrs. Foley, where do you reside? A. 169 Seneca Boulevard, Barnegat.

Q. And what is your occupation? [52] A. I am an investigator with the Board of Elections.

Q. And did you have anything to do with the complaint in rem filed in the tax foreclosure proceedings, which are the subject matter of this case? A. Yes I did.

Q. Can you tell us what your involvement was? A. I prepared the pleadings.

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Q. Now, do you work for Mr. Foster? A. I have an agreement with the office of Russo, Courtney & Foster where I do their in rem foreclosure work.

Q. Do you do that for others as well? A. Yes.

Q. And do you that on part-time basis? A. Yes, I do.

Q. So you don't work regularly for Mr. Foster's firm? A. No.

Q. I see. Does that agreement cover doing all of the in rem tax foreclosure work for Mr. Foster? A. Yes, it does.

Q. And for various other firms as well? A. Yes.

Q. Do you do any other kinds of work for legal firms? [53] A. Yes, in personam foreclosures, variance, site plans.

Q. You have not done any secreatrial work for Mr. Foster or his firm, have you, other than the work you just described? A. Just with regard to this.

Q. Just this matter? A. No. Just with regard to any of the in rem foreclosures I do all of the work.

Q. When you do that work, Mrs. Foley, do you do it at Mr. Foster's office or do you do it at some other location? A. No, I do it at home.

Q. So you are not regularly at Mr. Foster's office? A. No, I am not.

Q. Now, for how long have you been doing in rem tax foreclosure work? A. At least fifteen years.

Q. Now, in the course of doing work for one or more legal firms in the area, have you come to know of Robert Paschon? A. I know of him, yes.

Q. Can you tell me how you come to know of him? A. Just from hearing the name.

Q. Okay. And had you heard the name and known of [54] Mr. Paschon at the time that you did the work related to these tax foreclosure proceedings? A. Yes, I had heard the name.

Q. And you were aware, were you not, that Mr. Paschon was an attorney at law practicing in this area? A. Yes.

Q. And you were aware, were you not, that a Mr. Paschon maintained an office for the practice of law in this area? A. Yes.

Q. And you were aware, were you not, that

Appendix B

Mr. Paschon received mail at that office? A. I assume so.

Q. Now, had you also heard of Mr. Byron Kotzas at the time that you did the work related to these in rem tax foreclosure proceedings? A. Yes, I was aware of his name.

Q. Also.

Q. Did you know that he was associated are, on the other hand, a principal of Crossroads Realty? A. I had heard that, yes.

Q. And you were familiar, were you not, with the fact that Crossroads Realty maintained an office for the doing of real estate business in this area at those times? A. Yes.

[55] Q. And you were aware, were you not, that Mr. Kotzas regularly received mail at that office? A. I would assume he did.

Q. Now, did you prepare the complaint in rem, Mrs. Foley? A. Yes, I did.

Q. And I want to show you the complaint, which bears a filing date of September 8, 1982, which is part of the case file in this matter and ask you if that is, in fact, the complaint which you prepared? A. Yes, it is.

Q. Now, the final exhibit to that complaint,

is that the material, which was received from Mid-State Abstract? A. Yes, it is.

Q. Thank you.

I want to show you what's been marked as "DS-1" in evidence, which is a document entitled "Affidavit of service" sworn to by Joseph Foster on December 2, 1982, and ask you if that document was also prepared by you and the exhibits to that document attached by you? A. Yes, it is.

Q. And I want to show you exhibit DS-2 in evidence, which is an affidavit of nonmilitary service sworn you to by Mr. Foster on December 2, 1982, and ask you if you also [56] prepared that affidavit, Mrs. Foley? A. Yes, I did.

Q. Now, did you actually physically type the complaint? A. Yes, I did.

Q. Did you actually physically type the affidavit of service, which is DS-1? A. Yes.

Q. You actually physically type the affidavit of nonmilitary service, which is DS-2? A. Yes.

Q. Now, therefore, when you typed the complaint you were aware, were you not, that Mr. Paschon and Mr. Kotzas were designated in the caption as among the owners of property, is that correct? A. They were names that I typed.

Q. You typed those names, did you not? A. Yes, typed those names.

Q. When you typed Paragraph 5 of the complaint you were also aware that Mr. Paschon and Mr. Kotzas were named in Paragraph 5 as assessed owners of property which is the subject matter of the complaint, is that correct? A. I don't recall specifically Paragraph 5, but if I might review it?

Q. Surely. Mrs. Foley, if I ask you anything about [57] the document and I don't hand you the document, it is my fault and not yours, so please ask for it.

Is it correct that they are named in Paragraph 5? A. They are not named specifically, but they are referring you, are refering to this paragraph.

Q. Yes. Well, does this Paragraph 5 refer to a tax foreclosure list? A. Yes it does.

Q. Are they named specifically in the tax foreclosure list? A. I would have to check, I guess. Yes, they are.

Q. And you reviewed the tax foreclosure list and, in fact, physically attached it to the complaint at the time you typed the complaint, is that correct? A. Yes, I did.

MR. BECKER: Your Honor just so the record

may be complete, although I am not sure it's necessary, I would like to offer the complaint in evidence as DS-4.

MR. STARKEY: No objection.

THE COURT: DS-4 in evidence, the complaint

(Whereupon, the complaint was received and marked Defendants' Supplemental Exhibit DS-4 in evidence.)

Q. Now, in connection with the affidavit of service, which you prepared and physically typed, Mrs. Foley, [58] which is DS-1, did you make the determination and indicate whether each certified mailing was received or returned as indicated in the right hand column of Paragraph 2 of the affidavit? A. Yes, I did.

Q. Did you make that an examination—excuse me, did you make that determination by examining the returned envelopes? A. Yes.

Q. And are those returned envelopes included among the exhibits attached to DS-1? A. Yes.

Q. All right. Now, turn back to Paragraph 2 of the affidavit. Please tell me if it is not correct that there is an indication in that Paragraph 2 that the certified mailing to Mr. Paschon and the apparently separate certified mailing to Mr. Kotzas were returned? A. Yes.

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Q. And would you please look at the exhibits of the returned envelopes, which are attached to that complaints as an exhibit? Particularly, look at the envelopes returned, which had been addressed or purportedly addressed to Paschon and Kotzas. A. Yes.

Q. Now, would you look first to the envelope [59] returned, which was purportedly addressed to Paschon? A. Yes.

Q. Is it correct that that envelope carries among other designations the post office indication that it was returned, because the order to forward mail had expired? A. "Unable to forward; undeliverable as addressed; forwarding order expired."

Q. It also contains a hand written notation which indicates that the forwarding order expired, is that correct? A. Yes.

Q. You heard Mr. Foster testify here this morning Mrs. Foley? A. Yes.

Q. You heard his testimony, his understanding, the meaning of a forwarding order left with the post office, namely, that it's an order to the post office to forward mail to a new address when you move? A. I don't specifically remember that.

Q. Is that your understanding of such a

direction to the post office? A. Yes.

Q. And you've already testified that at the time you were doing these documents, including the affidavit of service, you were aware that Mr. Paschon was a practicing attorney in the area with an office in the area at which he [60] regularly received mail, is that correct? A. I would assume so, yes.

Q. When you saw the returned envelope from Paschon and you typed the affidavit of mailing which said, "Returned" and you physically took the envelope and attached it to the affidavit, didn't you realize that the envelope had been misaddressed or else it would have been received? A. I treated this envelope the same as I treated all the others that were returned.

Q. But you didn't answer the question, Mrs. Foley.

MR. BECKER: Could I have the question repeated please?

(The question referred to was read by the reporter.)

A. I don't recall.

Q. You don't recall.

Now, would you please look at the envelope addressed to Kotzas? A. Yes.

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Q. Does that have the same designations from the post office as those you have already described with respect to the envelope addressed to Paschon? A. Yes, they do.

Q. Now, you physically typed on the affidavit of service the indication that the certified mailing to Kotzas [61] was returned, is that correct? A. Yes.

Q. And you base that determination on the envelope, which you are now looking at, which you physically attached to the affidavit as an exhibit, is that correct? A. Yes.

Q. And you did that at the time that you were aware that Kotzas was a practicing realtor in this area with an office in the area at which he regularly received mail, is that correct? A. Yes, he was.

Q. Didn't you realize, Mrs. Foley, when the envelope addressed to Kotzas was returned, even though it was addressed to a man engaged in business in the area with an office in which he regularly received mail, that the envelope must have been misaddressed or it would have been received? A. No.

Q. No. You don't recall? A. I do not recall.

Q. In fact, Mrs. Foley, after you prepared that affidavit of service and indicated that the letters addressed to Paschon and Kotzas had been returned because a forwarding order to the post

office had expired, you took no action to cause any further notice to either of them, is that correct? A. I did not.

[62] MR. BECKER: I have nothing further of this witness.

CROSS-EXAMINATION BY MR. STARKEY:

Q. Mrs. Foley, did you take any further action with regard to any other envelopes that were returned? A. I did not.

Q. What was the source of the addresses, which you placed on the envelopes which were mailed out in accordance with the foreclosure complaint? A. I received the list of addresses from the Brick Town tax collector.

Q. Did you yourself, do you recall ordering those from the tax collector? A. Yes.

MR. STARKEY: I have no further questions.

REDIRECT EXAMINATION BY MR. BECKER:

Q. Mrs. Folley, when you ordered the title work from Mid-State Abstract did you ask them to do any address verification? A. No, I did not.

MR. BECKER: I have nothing further.

THE COURT: All right, thank you. Be careful stepping down.